Supreme Court of the United States

OCTOBER TERM, 1950.

No. 565.

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORATION, *et al.*,

Appellants,

against

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND COLUMBIA BROADCASTING SYSTEM, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

REPLY TO MOTION TO AFFIRM.

JOHN T. CAHILL,
Counsel for Appellants,
Radio Corporation of America, National Broadcasting Company, Inc., RCA Victor Distributing Corporation.

Of Counsel:
WEYMOUTH KIRKLAND,
HOWARD ELLIS,
JOSEPH V. HEFFERNAN,
JOHN W. NIELDS.

February 26, 1951.

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REPLY TO MOTION TO AFFIRM.

Statement.

This reply is filed by appellants Radio Corporation of America, National Broadcasting Company, Inc. and RCA Victor Distributing Corporation.

Appellants' Statement as to Jurisdiction sets forth the questions presented by this appeal. Contrary to appellees' contention, these questions are not only substantial but in most instances they are questions of first impression, and should be passed upon by this Court.

Some of the basic and controlling facts which establish the great public interest involved in this appeal are as follows:

The order here sought to be reviewed would put into commercial operation a system of color television from whose transmissions none of the nearly 12,000,000 sets now in the hands of the public would be able to receive any picture whatsoever.*

This means that if a television program is broadcast in accordance with the color television standards adopted by the Commission, none of the more than 45,000,000 people who now comprise the television audience would be able to get that program. Those of the 45,000,000 people who are accustomed to looking at a particular program would for the first time be unable to see that program when it is broadcast in accordance with the CBS standards adopted by the order.

This is what the incompatibility of the CBS color system means.

Each set owner would have to spend $50 or more, or a total of over half a billion dollars, to restore the program service which the 12,000,000 owners of television sets now receive. Even if this expenditure were made, the picture obtained from CBS color transmissions would be only a degraded black and white picture having less than half the detail of present black and white television pictures (Statement as to Jurisdiction, p. 48).

The addition of CBS color converters, which utilize spinning discs of red, green and blue filters, would require the 12,000,000 people who now own television receivers to incur the further expense of well over a billion dollars.

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* The figures referred to by the District Court were as of November, 1950 (Statement as to Jurisdiction, pp. 39, 48). At that time there were more than 9,000,000 television receiving sets in the hands of the public and a television audience of 35,000,000 people. Estimates as of three months later indicate that there are now nearly 12,000,000 television receiving sets in the hands of the public representing an investment of nearly $3,000,000,000, and a total television audience of 45,000,000 people.

Again, the picture so obtained would have less than half the detail of that provided by the existing service.

In addition, the spinning disc converters are cumbersome and involve a limitation of picture size to 12½ inches. In contrast, more than 90% of the television sets sold today have a picture size of 16 inches or larger.

The growth of television has been based upon the high-quality transmission standards for black and white television which were unanimously recommended by the industry and were adopted by the Commission in 1941.

Under these standards every television transmitter is receivable by every television receiver within its range. Under the order this will no longer be true.

The development of television is an achievement without parallel in American industry. The number of receivers in the hands of the public has grown from 15,000 in January 1947 to nearly 12,000,000 at this time, representing an investment by the public of more than $3,000,000,000. The television broadcasting service has correspondingly grown. It now provides the public with more than $150,000,000 of programs a year.

The Motion to Affirm states that the purpose of the Commission in adopting transmission standards is to ensure that there will always be a single set of standards for the regular commercial operation of the particular service involved (p. 3). In spite of this, the principle that every television transmitter must be receivable by every television receiver within its range has been discarded by the order. The order of the Commission here under review for the first time in the history of the federal regulation of radio provides for two incompatible sets of operating standards for a single set of channels.

The reciprocal relationship between the number of receivers in the hands of the public capable of receiving a service and the ability of the broadcaster to furnish a service to those receivers is basic to the economics of all broadcasting.

Except for CBS—the proponent of an incompatible system—the electronics industry, which created television and which has been responsible for its development, agreed that a satisfactory compatible color system was attainable. With the same exception, not a single witness testified that it was necessary or even desirable to adopt an incompatible color system in order to obtain color television.

In order to adopt color standards incompatible with existing standards it was necessary for the Commission expressly to repudiate and attempt to discredit the entire body of industry engineers upon whom it has heretofore relied.

In authorizing the broadcasting of an incompatible system, the Commission not only disregarded the almost unanimous position of industry experts, but it adopted an order which has the effect of prohibiting the broadcasting of compatible color in competition with incompatible color. This was done even though the uncontradicted evidence is that the broadcasting of compatible color would hurt no one.

The Questions Involved in This Appeal are Substantial.

The only issue presented by the appellees' Motion is whether the questions raised by this appeal are worthy of consideration and decision by this Court. The discussion which follows is directed solely to answering this contention. Full argument of the merits of the questions presented, as set forth in the Statement as to Jurisdiction and the Assignment of Errors, is reserved for the briefs and oral argument on the merits.

The facts heretofore set forth establish the magnitude of the public interest involved in this appeal.

Further, this is the first time that the federal regulation of this new and great television industry has come before this Court.

Preliminarily, it may be noted that the Motion to Affirm concedes the large public interest and the importance of the issues involved. The basis upon which appellees urge this Court not to hear the appeal is their contention that appel-

lants seek to raise questions "only of the correctness of the Commission's decision" and "of the wisdom of the Commission".

Appellants are convinced that the Commission's decision was both wrong and unwise.

That appellants have this conviction is no ground for denial of judicial review, particularly where, as here, the error so adversely affects the public interest—which this Court has said is the touchstone of the Communications Act—as to constitute an arbitrary and capricious exercise of power.

In attacking the Commission's decision, appellants raise important and substantial questions of far-reaching legal consequence. These include questions as to the scope of the authority of the Commission to regulate television through the promulgation of transmission standards—never before passed upon by this Court—and as to the way in which that authority should be exercised.

In addition, this appeal raises far-reaching legal issues with respect to the administrative process and the application and construction of the Administrative Procedure Act.

Appellants also call the Court's attention in this connection to the fact that the order under review was arrived at by a divided Commission and passed on by a divided District Court. Although the majority of the District Court dismissed the complaint and granted summary judgment for appellees, it also raised the question why it should "devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a *decision* of the Supreme Court" and that the controversy "badly needs the finality of *decision* which can be made only by the Supreme Court"* (Statement as to Jurisdiction, pp. 29, 38).

This construction of the case was enjoined upon the District Court by the appellees below when they urged that court to speed the case to this Court. Having convinced the District Court that its consideration was "little more than a practice session" for the instant appeal, the appellees

* Italics ours throughout.

now seek to deprive appellants of any review whatever by asking this Court not to hear the case (*Id.* at p. 29).

The importance of the legal issues involved and the necessity for a decision by this Court on those issues are discussed below.

ARGUMENT.

A. Transmission Standards Providing for Television Broadcasts Which Cannot Be Received on Any of the 12,000,000 Receivers in the Hands of the Public are Contrary to the Public Interest.

The transmission standards adopted by the order under review were tailored to fit the incompatible CBS system and no other. The adoption of a system of television broadcasting which cannot be received on any of the 12,000,000 receivers owned by the public is so drastic as in and of itself to bespeak arbitrary and capricious action. Before such a change becomes effective, it should be reviewed by this Court.

These standards have been adopted although it has been impossible to make the CBS system compatible. On the other hand, compatibility has been achieved. The Commission found, and the appellees' Motion concedes, that the RCA color system is compatible.

An incompatible system is, therefore, nothing more or less than an unready system. Incompatibility is a basic defect in a color system. It is a problem for the research laboratory. The cost of achieving compatibility should be borne by the developer of a color system. It should not be passed on to the public—as the Commission has done in this case.

In defining transmission standards in its May 28, 1940 Report the Commission stated:

> "Transmission standards may be simply defined as engineering rules governing the characteristics of the radio signal transmitted by the operation of radio apparatus. Such standards as a practical matter

> must require a fair degree of efficiency and assure to the public in basic outline a single uniform system of broadcasting which will enable every transmitting station to serve every receiver within its range.'"*

The basic authority of the Commission to prevent electrical interference between broadcasting stations involves the allocation of particular frequencies to particular services and the licensing of broadcasters to use such frequencies in certain locations. These activities of the Commission have often been presented to the courts.

The activities of the Commission in setting television transmission standards have never been before the courts.

No express authority for the setting of transmission standards is to be found in the Communications Act of 1934. However, no one has questioned the desirability of achieving the results described by the Commission in its May 28, 1940 Report, namely to provide:

> ". . . a fair degree of efficiency and assure to the public in basic outline a single uniform system of broadcasting which will enable every transmitting station to serve every receiver within its range."*

As stated in the Motion to Affirm, the Commission has heretofore adopted technical transmission standards which have assured that the public would receive a uniform satisfactory service. There has always been a single set of standards for regular commercial operation of the particular service involved in the use of a particular set of channels. Appellants urged this fact upon the court below and quoted extensively from the Commission's own Reports of May 28, 1940 and of March 18, 1947, which were concerned with television transmission standards.

Both in the court below and before this Court the appellees seek to distinguish these prior Commission Reports by pointing out that in 1940 and in 1947 it was contemplated that color broadcasting might require different standards from black and white.

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* *Report of the Commission in the Matter of Order No. 65 Setting Television Rules and Regulations for Further Hearing, Docket No. 5806*, p. 2 (May 28, 1940).

What the Commission has failed to point out either to this Court or to the court below are the facts that:

1. In 1940 there were virtually no television receivers outstanding, and very few in March 1947;

2. In so far as it was contemplated in 1947 that color broadcasting might require different standards from black and white, it was also contemplated that color television occupy a different portion of the radio frequency spectrum than the black and white service;*

3. In contrast, it is now accepted that color television will occupy the same portion of the radio spectrum as the existing television service; and

4. Not until millions (let alone the present billions) of dollars were actually invested by the public in television receivers did compatibility become a practical necessity.

The order of the Commission here under review is an abrupt departure from the Commission's past practice and policy with respect to television transmission standards.

In their Motion, appellees seek to justify the Commission's failure to require compatibility on the basis of the Commission's statement in its First Report that:

> "based upon a study of the history of color development over the past ten years . . . from a technical point of view compatibility, as represented by all color television systems which have been demonstrated to date, is too high a price to put on color." (¶123)

Any study of the "history of color development over the past ten years" from a "technical point of view" or any other point of view would have established that:

1. Many of the past ten years were war years, when weapons for the preservation of this country

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* See FCC, REPORT, March 18, 1947, 11 F. C. C. 1523.

were the subject of research and development—not color television;

2. Television did not really start until about four years ago; and

3. The present recognition that color television should occupy the same 6-megacycle channels as black and white television did not come until 1948.

Instead of the ten-year period referred to by the Commission, it is appropriate to talk only about a two-year period in so far as the development of compatible 6-megacycle color television is concerned. In this short period of time it is conceded that immense strides have been made.

Except for CBS—the proponent of the only incompatible system—the electronics industry, which created television and which has been responsible for its development, agreed that a satisfactory compatible color system was attainable. With the same exception, not a single witness testified that it was necessary or even desirable to adopt an incompatible color system in order to obtain color television.

The District Court did not pass upon the scope of the power of the Commission to adopt transmission standards in general or the specific transmission standards involved in this appeal.

The reason assigned by the District Court for not vacating the order and sending the proceedings back to the Commission for further consideration with respect to the existence of a satisfactory compatible system was the alleged necessity for the finality of decision which could be made only by this Court, a course of action which had been urged upon the District Court by appellees (Statement as to Jurisdiction, p. 38).

In addition, the dissent of District Judge La Buy states as follows:

> "It is conceded by all and it is self-evident that the best system of color television is a compatible one; that is, a system requiring no change whatever in existing receivers for the reception of black and

white as well as color pictures. Indeed, compatibility is the coveted goal of all engineers and scientists engaged in the television industry.

* * * * * *

"It is my opinion the Commission's precipitous action in entering the order, the impact of which will require owners of television sets to install equipment at a cost of many hundreds of millions of dollars, and its refusal to hear additional evidence clearly indicates an abuse of discretion and constituted action which was arbitrary and capricious." (*Id.* at pp. 42, 44)

Indeed, the President of CBS testified before the Commission that CBS would "love" to have compatibility.

In this dynamic art and in light of the fact that everyone, including CBS, agrees that compatibility is of the first importance, one would expect to find compelling technical reasons advanced for the adoption of the incompatible CBS system. This is not the case. On the contrary, the Reports of the Commission are replete with faint praise of the incompatible CBS system. *What the Commission has had to do in order to adopt the CBS system is to distort the most compelling reason for the rejection of that system—its incompatibility—into the sole reason for its adoption now.*

Appellants respectfully submit that they are entitled to a judicial determination of whether the Commission has the authority to set transmission standards which do not provide a single set of standards for a single service in a single set of channels.

The industry has invested hundreds of millions of dollars and the public has invested billions of dollars to create and receive a television service which the order would disrupt.

Appellants further respectfully submit that the action of the Commission in disrupting this service directly contravenes the Commission's statutory obligation to protect the public interest, and is arbitrary and capricious.

B. The Commission's Record Is Admittedly Inadequate; It Has Violated Its Duty To Inform Itself and To Take Account of Determinative Facts.

Admitted Inadequacy Of Administrative Record.

The First Report of the Commission makes it clear that this is not a case in which the Commission can properly claim that the record supports its order. Indeed, the Commission cannot properly claim even to have completed such a record.

The CBS incompatible color system dates back to 1940. It was rejected by the Commission in 1947 for defects which it still has, as well as because it required 16 megacycles to give picture detail comparable to that provided by existing television standards.* In the present 6-megacycle channels, the CBS system has less than half the picture detail of the existing black and white standards.

The RCA compatible all-electronic color television system is relatively new. This system utilizes the principles of the RCA simultaneous system first demonstrated in 1946 which required 14 megacycles.** The development of the RCA color system to the point where it would operate in a 6-megacycle channel, without sacrificing picture detail, took place in 1949.

As successively demonstrated during the hearings, and since, the RCA system has improved in practical operation

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* FCC, REPORT, March 18, 1947, 11 F. C. C. 1523.

** In 1947 the Commission noted that it would take from four to five years to develop this system into a commercial service. In 1948 the Commission still regarded four or five years as an appropriate period of time for the commercial development of the RCA color system. This fact is to be compared with the Commission's present statement that a review of the last ten years indicates the unlikelihood of the commercial development of the RCA compatible system. The RCA system has not only been developed into a commercial reality, but, in addition, has been put into 6 megacycles in less than the time contemplated in 1947 and 1948.

by leaps and bounds. This is conceded by all (Statement as to Jurisdiction, pp. 34-35).*

On the other hand, the CBS incompatible system has remained basically as it was in 1940. A mechanical disc is still used, with its inherent limitations on picture size, rather than electronic means, to produce color.

In this state of affairs, the Commission issued its First Report of September 1, 1950, the taking of testimony having ended in May, 1950. In this Report, the Commission purported to evaluate both systems, *but adopted neither.*

As indicated, the RCA system was new. Nevertheless it had, as the Motion to Affirm concedes, solved the all-important problem of compatibility. In addition, RCA had only late in the hearings developed and demonstrated the tri-color picture tube, one of the greatest inventions in the television art.

Accordingly, the Commission, recognizing that "fundamental research cannot be performed on schedule" and that "much of the fruit of this research is only now beginning to emerge", stated that it wished more time before freezing standards for color.

This conclusion was in accord with the Commission's consistent past practice and with the mandate of the Communications Act of 1934.

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* For example, the record reflects the following comments of members of the Commission with respect to the RCA system:

The Acting Chairman of the Commission stated to an RCA witness on the record on April 11, 1950 that

> "... your picture is greatly improved since your first showing." (Tr. 8516)

Another Commissioner commented on March 16, 1950:

> "... we have seen that [the RCA system] and *it produced beautiful color.*" (Tr. 6900)

The same Commissioner also stated on February 27, 1950:

> "I noticed the marked improvement in your color the other morning at Laurel, and I think we all did, and I was completely surprised by the *life-like reproduction*, particularly in the final RCA picture, where the man inserted flowers in that shallow dish." (Tr. 6130-31)

In refusing to adopt television standards in 1940, the Commission stated in its Report of May 28 of that year:

> "It would be a violation of its statutory obligations for the Commission to disregard any facts which might foreclose a proper exercise of its duty to fix transmission standards . . . ." (p. 19)

This principle of administrative construction was reaffirmed by the Commission in its Report of March 18, 1947, which rejected the CBS system. The Commission then said:

> "Before approving proposed standards, the Commission must be satisfied not only that the system proposed will work, but also that the system is as good as can be expected within any reasonable time in the foreseeable future." (11 F. C. C. 1523, 1525)

On the other hand, the Commission in this case also found defects in the CBS incompatible system, ten years old and at least once rejected as it was, which the Commission thought should be overcome before adoption, even assuming that an incompatible system should in any case be adopted. These limitations were susceptibility to flicker, low picture detail, and limited picture size.

The Commission stated *as to all three of these limitations** that the adoption of the CBS system would mean that the Commission was

> "compelled to *speculate* as to an important basis for its decision. . ."

and that

> "the Commission's determination on an important part of its decision would be based on *speculation and hope*. . . ."

In spite of these clear statements that a decision could not properly be made without further information and further opportunity for the development of all systems, the

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* Not, as the Motion to Affirm says, only as to the limitations on picture size. See First Report, ¶¶146-47.

Commission on October 10, 1950 adopted standards for the CBS incompatible system without receiving such further information as to the CBS system, refusing to consider further information with respect to the RCA system, and without according opportunity for further development.

Another point raised by this appeal relates to the illegality of the conditions upon which the Commission stated it would take the time it considered necessary to inform itself with respect to the matter before it. Both conditions were unlawful and one was impossible. These are discussed in the Statement as to Jurisdiction and in the Reply of Intervener-Appellant Emerson Radio & Phonograph Corporation and, for that reason, will not be discussed here.

The significant point here is that the Commission recognized in its First Report that the record of the hearings before it was inadequate to enable it to discharge its duties. The Commission nevertheless failed to inform itself as to matters it recognized it should.

Whether the Commission can base a decision upon a record which its own Report has stated is inadequate clearly presents a novel and substantial question for this Court to decide.

Indeed, in this very connection the majority of the District Court said of the Commission's refusal to further inform itself:

> "Admittedly, much progress was made during the latter portion of the hearings and, as claimed, after the hearings closed, in the development of a compatible system of color television. Particularly was such progress made by RCA, and as we view the situation the most plausible contention made by plaintiffs is that the Commission abused its discretion in refusing to extend the effective date of its order so that it might further consider the situation, and particularly the improvement which it is claimed had been made by RCA and others." (Statement as to Jurisdiction, pp. 34-35)

In dissenting from the decision of the District Court, Judge La Buy stated:

> "... it is difficult to understand why the Commission refused to hear additional evidence and chose instead

> a course of action, using its own words, based 'on speculation and hope rather than on demonstrations.'" (*Id.* at p. 44)

Furthermore, as set forth in the Statement as to Jurisdiction, in so far as the Commission made findings based upon evidence in the record, it in many instances relied squarely upon clearly superseded evidence in reaching its result. In a situation of this kind where a dynamic science is involved, it is clear that findings which are based in whole or in part upon superseded evidence cannot be findings based upon substantial evidence. This is an important and unique question.

As stated by the majority of the District Court:

> ". . . a number of critical findings [of the Commission] are based upon evidence which was taken in the earlier stage of the proceeding which is not representative of the situation as it existed at the time the findings were adopted." (*Id.* at p. 34)

The District Court thus recognized the existence of the question. But it did not pass upon it, nor has any decision of this Court ever dealt with that question.

Commission's Violation of Obligation To Inform Itself.

The instant case presents a substantial question as to the duty of the Commission, under the Communications Act of 1934, to inform itself during a rule-making proceeding of relevant and significant scientific data fully available to it.

In a rule-making proceeding, appellants contend that the Communications Act* requires the Commission to con-

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* For example, Section 303(g) provides as follows:

> "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
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> • • • • • •
>
> "(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest" (48 Stat. 1082, as amended, 50 Stat. 190, 191; 47 U. S. C. §303(g)).

sider all pertinent information submitted to it prior to the issuance of rules. This obligation exists so that the Commission will have a sound informed basis on which to formulate policies in the best interests of the public.

The action of the Commission in this case indicates that it believes its responsibility to the public ceased when the testimony was completed. On that theory it refused to consider information of controlling significance concerning scientific developments submitted to it after the testimony was completed on May 26, 1950, but prior to its order.

The order of the Commission was issued October 11, 1950. On the previous July 10 the Condon Report* was published. On July 31, 1950 RCA submitted its Progress Report** to the Commission.

After the Commission in its First Report of September 1 refused to consider this information, RCA submitted these Reports as part of its Comments, which had been requested by the Commission at the time it issued its First Report.

Each of these Reports was relevant and significant. The Progress Report contained data on new developments in the performance of the RCA system which showed that certain criticisms leveled at the system by the Commission were without merit.

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* The Condon Committee was headed by Dr. Edward U. Condon, Director of the National Bureau of Standards. This committee consisted of "a small group of scientific persons of repute, none of whom are employed by or have any connection directly or indirectly with any radio licensee or radio-equipment manufacturer", and was organized at the request of the Chairman of the Senate Committee on Interstate and Foreign Commerce to give "sound, impartial, scientific advice" on color television. The Report is printed as SEN. Doc. No. 197, 81st Cong., 2d Sess. (1950).

** The RCA Progress Report, submitted to the Commission first on July 31, 1950, reported the accomplishment of various improvements in the RCA system and color equipment which had been referred to prior to the close of testimony on May 26, 1950.

With respect to the Condon Report, the majority of the District Court stated:

> "No doubt this report refutes numerous of the findings made by the Commission and gives a far more favorable appraisement of the RCA system than that attributed to it by the Commission." (Statement as to Jurisdiction, p. 36)

However, the Commission never did consider the information in these Reports (Defendants' Brief in District Court, p. 28 and Motion to Affirm, p. 21).

Moreover, on October 4, 1950, RCA formally petitioned the Commission, before making a final determination in respect of color standards, to review the improvements made in the performance of the RCA system and to view experimental broadcasts of color signals of the RCA, CBS and other systems.

Meanwhile, others, including the General Electric Company and the Hazeltine company, had also called the Commission's attention to further developments in compatible, all-electronic, high-definition color television systems.

Nevertheless, the Commission refused to consider any of these important developments and denied the RCA Petition out of hand. On October 10, 1950 the Commission adopted its Second Report, concluding, *without looking at them*, that no improvements in compatible systems warranted a reopening of the record.

The Commission swallowed its own expressed *"speculation and hope"* about the CBS system and adopted it finally without going into the matters with respect to which it said it should have further information.

The Commission in its First Report had recognized that

> "the institution of these proceedings stimulated great activity in the color field and that since fundamental research cannot be performed on schedule, it is possible that much of the fruit of this research is only now beginning to emerge." (¶148)

The Commission's refusal to inform itself contravenes not only the Communications Act but also a basic tenet of administrative rule-making.

One of the chief purposes underlying the creation of the administrative process was the need for a flexible governmental body—a body possessed of the procedural latitude necessary to gather and to consider all relevant information when it was engaged in the promulgation of rules affecting the public interest. It was recognized that the judicial process, circumscribed as it is by various formalities, including a formal record, was less adapted to cope with many of the complexities of modern civilization.

As stated by James M. Landis in *The Administrative Process* (1938):

> "One other significant distinction between the administrative and judicial processes is the power of 'independent' investigation possessed by the former. The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy *upon the record as made by the parties**. . . . the judge must not know of the events of the controversy except as these may have been presented to him, in due form, by the parties." (pp. 37-38)

In contrast,

> "For that [administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." (p. 39)

Similarly, Kenneth Culp Davis, Professor of Law at The University of Texas, has stated:

> "Congress has assigned to each regulatory agency the affirmative duty of securing all relevant information, whether produced by the parties or not."**

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* Italics in original.

** *Official Notice*, 62 HARV. L. REV. 537, 542 (1949).

In the setting of standards for AM and FM sound broadcasting and for television the Commission has heretofore recognized that its mandate to serve the public includes a broad responsibility to consider relevant information from all sources, whether oral or written. For example, the Commission has stated that its standards are based upon the best engineering data available, including evidence at hearings, conferences with radio engineers and data supplied by manufacturers of radio equipment and by licensees of broadcast stations.

In refusing to adopt television standards in 1940, the Commission stated in its Report of May 28 of that year:

> "It would be a violation of its statutory obligations for the Commission to disregard any facts which might foreclose a proper exercise of its duty to fix transmission standards . . . ." (p 19)

However, in these proceedings the Commission refused to consider relevant matter either formally presented to it or informally brought to its attention.

Thus, the case involves the important question as to whether an agency, which is under a duty to promote the public interest and which is engaged in a rule-making proceeding involving the evaluation of a dynamic science, can lawfully refuse to inform itself of pertinent and determinative scientific data fully available to it.

Further, contrary to all the principles of administrative law, the Commission has gone so far in these proceedings as to state that it was legally precluded from considering such material. Thus, the Motion to Affirm repeats the position taken by the Commission before the District Court to the effect that consideration by the Commission of either the Condon Report or the RCA Progress Report would have been legally improper (Motion to Affirm, p. 21).

Any such position would seem obviously to present a substantial question requiring decision by this Court. If administrative agencies are to take the position that they are legally precluded from considering pertinent facts in a rule-making proceeding, the administrative process is certain to stultify itself.

Commission's Refusal to Consider Relevant Matter Presented Violated the Administrative Procedure Act.

The instant case presents a substantial and novel question with respect to the construction of the Administrative Procedure Act. This question is of general interest and concerns both the practices of the Federal Communications Commission and those of other federal administrative agencies as well.

The question arises from the refusal of the Commission to consider the RCA Progress Report and the Report of the Condon Committee, even though these were submitted to the Commission in RCA's Comments which were requested by the Commission in the proceedings before it. Whether or not the Commission had a duty under the Administrative Procedure Act to consider these Reports depends upon the construction of Section 4(b) of that Act. Under the construction of the Act which appellants believe proper the Commission had the affirmative statutory duty to consider these Reports. The appellees in their Motion argue for a contrary construction.

Section 4(b) of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. §1003(b)), dealing with rule-making proceedings, provides in part:

> "After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments *with or without opportunity to present the same orally in any manner;* and, *after consideration of all relevant matter presented,* the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose."

Appellants believe that this requirement that the administrative agency shall consider

> ". . . *all* relevant matter presented . . ."

means just what it says.

But the Commission has admitted that it did not consider the Report of the Condon Committee nor the RCA Progress Report. In respect of the former, for example, it said in its brief in the District Court:

> "It is obviously improper to consider such a report . . ." (p. 28).

Although the proceedings before the Commission were clearly rule-making proceedings, the appellees now attempt to justify the Commission's refusal to consider "relevant matter presented" on the ground that somehow this rule-making proceeding was different from other rule-making proceedings. They endeavor to differentiate on the ground that in this proceeding there was a "testimonial hearing" (Motion to Affirm, p. 23).

This differentiation, it is submitted, is not in accord with the statute. Nor is it in accord with the Commission's express statement that in establishing "rules and regulations, *and engineering standards*, . . . it *must conform to the Administrative Procedure Act* which prescribes uniform rule-making practices for Federal agencies to follow." (16 FCC Ann. Rep. 13-14 (1950)).

The statute provides that interested persons shall be given an opportunity to "participate in the rule making through submission of written data, views, or arguments *with or without* opportunity to present the same orally in any manner. . . ." The statute does not set up two alternative procedures—one covering written data and the other an oral presentation. It shows on its face that the oral presentation is *in addition to* the "written data, views, or arguments". The statute directs that the agency shall consider "*all* relevant matter presented". The word "*all*", it is submitted, covers both the written and the oral presentations.

It is submitted that Section 4(b) of the Administrative Procedure Act does not permit an agency to refuse to consider written data submitted in those cases in which any

opportunity for oral presentation is afforded nor to pick and choose what relevant matter it will consider.*

C. Prohibition of Broadcasting of Compatible System in Competition with Incompatible System is Contrary to Law.

In addition to, but wholly apart from the question of whether the adoption by the Commission of an incompatible color television system was contrary to law, are the following:

(1) Whether the Commission was authorized to prevent competition in broadcasting where no interference by one broadcaster with the signals of another is involved;** and

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* With regard to the Report of the Condon Committee and the RCA Progress Report, appellees stated in their Motion to Affirm (p. 21) that

> "Were the reports to be given consideration as a basis for modified findings and conclusions, conformity with the prior course of the proceedings and fairness to the parties would have required that the record be reopened for the introduction of these reports as evidence subject to cross-examination by the other parties."

If fairness to the parties required that an opportunity for cross-examination be afforded with respect to the Reports, that is precisely what the Commission should have given.

** The Commission is not justified in saying that, unless standards are first set by the Commission, each broadcaster could transmit whatever type of signal he chose

> "regardless of its interfering effect on other broadcasters . . ." (Motion to Affirm, p. 3).

The fundamental purpose of the Communications Act of 1934 and of its predecessor, the Radio Act of 1927, was to confer upon the Commission authority to prevent just such interference by one broadcaster with the signals of another. The Commission clearly has such authority—before or after the adoption of commercial standards.

This case does not present that problem at all. It presents, in fact, just the converse. It involves for the first time the question whether the Commission has the authority to rule out color signals which do *not* interfere with the signals of other broadcasters, which *can* be received on all existing sets, and which do not hurt anyone.

(2) Whether such action can be sustained where there is a total lack of administrative findings to support it.

Both of these questions are substantial.

Limitation on Competition.

The general policy of the Communications Act of 1934, in so far as it relates to broadcasting, is one of competition. The decisions of this Court emphasize the obligation of the Commission to promote competition in broadcasting.

Nevertheless, the action of the Commission prohibits the broadcast of compatible color signals—those which can be received in black and white on the nearly 12,000,000 black and white sets now in the hands of the public—and permits only the broadcast of incompatible color signals—those which cannot be received on existing television sets.

The Motion to Affirm (p. 3) concedes that the effect of the order is to provide that if the broadcaster should choose to broadcast color television, the signals transmitted must conform to the standards adopted by the Commission. These standards have been written for the incompatible CBS system only.

As is thus apparent, the order prohibits the broadcasting of television signals in accordance with the RCA compatible system, although the Commission has found that these signals can be received on the 12,000,000 black and white receivers in the hands of the public as black and white pictures, without the owners so much as touching their receivers.

The Commission has also found that the broadcasting of RCA color would not create electrical interference by one broadcaster with another.

The Commission's Reports and order clearly contemplate that television signals transmitted pursuant to the CBS system will be reproduced on some receivers as color pictures and on other receivers as black and white pictures. But the order prohibits the addition of technical character-

istics to the existing television signals which would make possible the reproduction of those signals in color as well as in black and white.*

As a result, the present system of black and white must face competition with CBS black and white. But CBS color is immunized from competition with compatible color.

This limitation on competition was imposed in spite of the clear and uncontradicted fact, testified to by the CBS Vice President and Chief Engineer, Dr. Goldmark, that the adoption of compatible color television standards would hurt nobody.

Dr. Goldmark, testifying for CBS, the sole proponent of an incompatible system, stated:

> "There is one non-compatible system. . . . There are two compatible systems . . . I couldn't sit here and tell you not to adopt standards of any of those systems because they don't have that device because nobody would get hurt by it if you do. *They are compatible.*" (Tr. 6546)

The Communications Act gives the Commission no power thus to suppress competition. On the contrary, the policy of that Act, in so far as it relates to broadcasting, is to encourage competition.

This case presents for the first time the question of whether the Commission has the legal power thus to suppress competition.

For the first time in the administrative practice of the Commission it has adopted the theory of permitting some competition among transmitting systems within the same broadcast band while suppressing other competition among those systems. No judicial determination by this Court nor any other court supports this assertion of authority by the Commission to limit competition.

The general policies of the Communications Act in respect of competition in the broadcasting field were stated

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* This is what the RCA system does. It adds technical characteristics to the standard television signal, enabling receivers designed to use those extra characteristics to produce color pictures.

by this Court in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940):

> "... the [Communications] Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not ... abandoned the principle of free competition. ...
>
> • • • • • •
>
> "Congress intended ... to permit a [broadcasting] licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." (pp. 474-75)

The majority of the District Court did not refer to the action of the Commission in restricting competition. Judge La Buy in dissenting, however, stated that:

> "To prohibit the broadcast of color in completely compatible systems, whether it is RCA or any other fully compatible system, is a bar to competition between compatible and incompatible color and is unreasonable and arbitrary." (Statement as to Jurisdiction, p. 44)

Absence of Required Findings.

The Commission made no findings on the question of refusing to permit broadcasting of the compatible RCA system in competition with the incompatible CBS system.

On the contrary, the Commission has found that the broadcasting of RCA color would not, in the language of the *Sanders* case, create electrical interference by one broadcaster with another.* There is no finding by the Commission, contested or otherwise, that the commercial broadcasting of the RCA compatible television system should not also be authorized together with the incompatible system.

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* The interference referred to in the Commission's findings as applicable to the RCA color system was alleged interference *to* RCA color receivers caused by other electronic devices. Whether or not this may serve as a basis for action by the Commission to deal with interference caused by those devices, it does not furnish a basis for the rejection of a system whose broadcast transmissions do not interfere with the transmissions of other broadcasters.

During the hearings there was substantial questioning and testimony with respect to the possibility of permitting free competition between the CBS and RCA color systems and thus permitting the public to choose. Brigadier General David Sarnoff, Chairman of the Board of RCA, recommended that if the Commission should adopt standards for an incompatible system, it should permit the broadcasting of compatible systems as well. He urged that the standards set by the Commission be broad enough to permit any color television systems which met the basic requirements of compatibility, definition equal to the present high quality television standards, and transmission within a 6-megacycle channel.

So far as appears from the Commission's First and Second Reports, however, the Commission did not even consider whether there was any middle ground between the exclusive adoption of an incompatible system and the exclusive adoption of a compatible system. The Reports do not show that the Commission considered the possibility or advisability of permitting the broadcasting of compatible color together with the broadcasting of incompatible color.

It is apparent, therefore, that reversal of the District Court's judgment is required by the decision of this Court in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946). In that case, this Court held that it should not consider whether the complete prohibition there imposed by the Federal Trade Commission was warranted, since the Commission had not considered whether alternatives were possible:

> "But in the present case, we do not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception which it found lurking in the word Alpacuna. For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease

> and desist order prohibited the further use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. . . . Its expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made." (327 U. S. at pp. 613-14)

The instant case is *a fortiori* under the *Siegel* case. Whether this Commission has the power to suppress scientific development is certainly one of the substantial questions presented to this Court. If the Commission does have that power, it is one to be exercised with the greatest restraint and only if no other reasonable alternative is available, since it involves the priceless national resource of invention and research. Here the alternative was to permit compatible color to prove its worth in the arena of public choice—an alternative that is not even discussed in the First and Second Reports.

Appellees contend in their Motion that the Commission's limitation on competition is justified on the ground that permitting more than one system of color "would be complex and confusing, and would result in the purchase either of unduly complicated and as yet undeveloped receivers, or of receivers which could receive only some of the color broadcasts and not others." (Motion to Affirm, p. 19)

This argument of "confusion" is the classic one always advanced against competition.*

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* This argument is to be compared with the statement of the Commission in its Second Report, welcoming the idea of competition as between color receivers and black and white receivers:

> "In any event, if both types of receivers are offered to the public, *it will be the free forces of competition which govern whether a customer will buy* a color receiver or a black and white receiver." (¶12)

This Court cannot be asked to believe that competition between incompatible color and black and white should be encouraged but that the addition of a compatible color system to the range of free public choice would be intolerably confusing.

Moreover, no such findings of confusion and complexity were made by the Commission. Arguments of counsel are thus sought to be made a substitute for the lack of findings of an administrative agency. As this Court held in rejecting a similar effort in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (1943):

> "But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based." (p. 92)

The foregoing rule that administrative action is legally valid only if it is based on *findings* has been consistently applied by this Court. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946); *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327, 333 (1945); *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 626, 634 (1945); *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 208-12 (1944); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 92-94 (1943), 332 U. S. 194, 196-97 (1947); *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-89 (1942); *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 196-97 (1941); *National Labor Relations Board* v. *Fansteel Corp.*, 306 U. S. 240, 261 (1939); *Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50, 53 (1946); *Yonkers* v. *United States*, 320 U. S. 685, 691-92 (1944); *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U. S. 499, 510-11 (1935); *United States* v. *Baltimore & Ohio R. R.*, 293 U. S. 454, 463-65 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431-33 (1935).

The appellees contend that the Commission's refusal to permit the broadcasting of RCA compatible color in competition with CBS incompatible color is supported by their argument that the Commission should not "encourage the public to purchase RCA color receivers which cannot produce satisfactory color pictures . . . ." (Motion to Affirm, p. 19)

This is another argument of counsel which cannot be substituted for findings. In addition, any finding with respect to the quality of RCA color pictures is not directed to whether competition between compatible color and incompatible color should be permitted, since the Commission's Reports do not show that this question was considered.

Furthermore, the language of the Communications Act and its legislative history as well establish that the Commission has no jurisdiction to say what kind of television receivers shall be manufactured nor what kind of television receivers the public shall buy. The Act leaves that to competition.

From the standpoint of television receivers, no finding could therefore be made which would provide a lawful basis for an exercise of power by the Commission prohibiting competition between compatible and incompatible color.

D. The Errors of the District Court.

The substantial question relating to the right of appellants to a judicial review of the Commission's order is avoided entirely by appellees in their Motion. Nowhere is there any reference to the question set forth in appellants' Statement as to Jurisdiction as follows (pp. 9-10):

> "Whether the District Court erred in failing to rule on many determinative issues of law and fact (including the issue of whether the Commission's Order was supported by substantial evidence), the decision of which is essential to the proper disposition of the appeal, and in referring the decision of such issues to the Supreme Court, stating that it could not see 'why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court.'"

The majority of the District Court left important issues of the case unresolved.

An analysis of the opinion of the majority of the District Court shows this to be true. In addition, the express language of the District Court shows that it intended to leave the decision of the case on the merits to this Court.

Thus, the majority of the District Court stated (Statement as to Jurisdiction, p. 29):

> ". . . we have been unable to free our minds of the question as to why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court. This is so because any decision we make is appealable to that court as a matter of right and we were informed during oral argument, in no uncertain terms, that which otherwise might be expected, that is, that the aggrieved party or parties will immediately appeal. In other words, this is little more than a practice session where the parties prepare and test their ammunition for the big battle ahead."

In addition, in giving the basis for its order dismissing the complaint and allowing defendants' motion for summary judgment, the majority of that court said (*Id.* at p. 38):

> "Thus, as we evaluate the situation, there are two courses open, (1) to allow defendants' motion for a summary judgment, and (2) to vacate the order and send the proceeding back to the Commission for further consideration in view of recent developments in the color television field as well as the rapidly changing economic situation. A pursuance of the latter course, assuming we have such authority, of which there may be doubt, would inevitably result in the prolongation of the controversy which badly needs the finality of decision which can be made only by the Supreme Court. In other words, the interests of all, so we think, will be better served with this controversy on its way up rather than back from whence it comes."

For all practical purposes, appellants have not been given their day in court. If this Court should grant ap-

pellees' Motion to Affirm, appellants would, in effect, be deprived of judicial review.

This presents a substantial question for decision by this Court. Compare *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265, 285 (1949); *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257 (1910); *Ex parte In the Matter of Harley-Davidson Motor Co.*, 259 U. S. 414 (1922); and *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290 (1933); see also *William Cramp & Sons Ship and Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U. S. 645, 648-49 (1913).

The action of the District Court in failing to make determinations on many of the issues presented to it is sufficient to give rise to substantial questions for this Court to decide, and to preclude the granting of the Motion to Affirm.

Nor is extended discussion necessary with respect to the ruling of the District Court as to evidence not considered by the Commission.

Certain of the evidence submitted to the Commission, and disregarded by the Commission, was submitted to the District Court for the purpose of obtaining the District Court's decision as to whether such evidence was rightly or wrongly disregarded by the Commission. This the District Court refused to consider on the ground that it did not have power to consider such evidence even in order to decide whether the Commission's disregard was proper (Statement as to Jurisdiction, pp. 37-38).

An important question is therefore presented to this Court, namely, whether there is or is not a remedy for the unlawful refusal of an administrative agency to consider admittedly relevant evidence accruing and presented well before the administrative decision is made.

Surely the District Court was in error in concluding that it could not consider such evidence for the purpose of determining whether such evidence should have been considered by the Commission.

Either the District Court is wrong on this issue, and must be reversed, or the issue must be determined by this Court. The far-reaching consequences of the decision on this point are clear.

E. No Administrative Agency Should Rely on an Interested Staff Member.

Appellees have argued in their Motion that this Court should not consider the issues arising from the role played in the administrative proceedings by a Commission staff engineer who had an interest in the adoption of the CBS system (Motion to Affirm, p. 26). Appellants believe that, in view of the scientifically complex matters with which government is becoming increasingly concerned, the necessity of dealing with such matters through administrative agencies, and the necessity of reliance by these agencies on members of their technical staff, these issues deserve this Court's most careful consideration.

The facts set forth in appellants' complaint and affidavits and not denied in any of the appellees' affidavits, motions or briefs are:

1. The Commission staff engineer, Chapin, took a most active role throughout the hearings and was in charge of the Commission's laboratory which tested the color systems. He had an interest of professional prestige and reputation in the adoption of the CBS system although no financial interest remained, and supported the CBS system throughout the hearings. He was the only witness other than CBS witnesses who supported an incompatible system.

2. In weighing the highly technical issues before it, the Commission relied upon this engineer's advice.*

* Only two of the seven members of the Commission have had technical training, and one of the two (the former Chief Engineer of the Commission) dissented from the adoption of the order. The rest are laymen.

3. This engineer advised the Commission in the absence of the proponents of color systems and participated in the formulation and preparation of the order and Reports of the Commission which are under review.

In their Motion, appellees have not argued that it was proper for the Commission to allow Chapin to participate as he did. Instead, their argument is that the impropriety of the Commission's action does not present a substantial question; first, because the objection by appellants when Chapin's interest became known was not properly phrased, and second, because it is not shown that the Commissioners were themselves biased.

Appellants submit that the objection made by RCA did raise for the Commission's consideration the question whether Chapin should be allowed to continue in the proceedings. The Commission's obligation to the public to avoid bias on the part of its staff is not a contingent one which becomes fixed only if certain magic words are spoken. The Commission's attention was directed to the point. This was enough.

So also with the argument that appellants have not shown that the Commissioners were themselves biased. As is true of many agencies dealing with complex scientific and technical problems, the majority of the members of this Commission are laymen. When passing on such problems, the technical findings which such an agency makes necessarily depend on the technical advice which it gets. The public has a right to expect that those members of its staff who are permitted to participate in the decision-making process will be free from personal interest in the Commission's decision.

When this is not true, it should be unnecessary to show actual bias on the part of the Commission. The danger of wrong is so great that it is the danger itself which should not be tolerated.

Conclusion.

Appellants respectfully submit that the Motion to Affirm should be denied in all respects. Because of the substantial issues presented, and because of the great public interest involved, this appeal should be fully briefed and fully argued. Compare *National Broadcasting Company* v. *United States*, 319 U. S. 190 (1943); *Insurance Group Committee* v. *Denver & Rio Grande Western R. R.*, 329 U. S. 607 (1947); *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90 (1946); *St. Louis, Kansas City and Colorado R. R.* v. *Wabash R. R.*, 217 U. S. 247 (1910); *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950); *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327 (1945); and *Patterson* v. *Lamb*, 329 U. S. 539 (1947).

Respectfully submitted,

JOHN T. CAHILL,
Counsel for Appellants,
Radio Corporation of America, National Broadcasting Company, Inc., RCA Victor Distributing Corporation.

Of Counsel:

WEYMOUTH KIRKLAND,

HOWARD ELLIS,

JOSEPH V. HEFFERNAN,

JOHN W. NIELDS.

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